Even assuming that this application had been properly begun, are there merits disclosed in the plaintiffs' affidavits that warrant my setting aside the district land administrator's order? For this, the plaintiffs can only possibly rely on two grounds as disclosed in their affidavits:

(1) Lack of legal representation at the inquiry before the district land administrator when he refused the application of the plaintiffs' solicitors for an adjournment. I do not consider that the absence of the plaintiffs' solicitors at the inquiry had prejudiced the plaintiffs' case in any way as under s 262 of the National Land Code, the only persons entitled to be heard are the chargor or chargee who are the plaintiffs and defendants and since both were present, the district land administrator had every right to proceed with the inquiry.

(2) The allegation that the defendants have claimed double interest, 13.25% pa on the principal loan of $1 million and 18% pa on the excess. Under cl 10 of the annexure to the charge, the defendants are entitled unilaterally to vary the rate of interest from time to time without notice. Thus when the loan facility was first granted, the interest chargeable was 15.5% pa. This was later reduced by the defendants to 13.25% pa, a fact in no way disputed by the plaintiffs. However, a different and higher rate of interest is levied if the plaintiffs use the facility above the approved limit of $1 million. This was clearly spelt out in the Form 16D notice sent by the defendants to the plaintiffs on 22 September 1986 which, as far as I can see, was never objected to until the order for sale was made. Since the plaintiffs had exceeded the use of the approved limit, they were charged a higher rate for the excess.

Since even on the merits, the plaintiffs had failed to establish that the district land administrator had been wrong in making the order for sale under s 263(1) of the National Land Code, the application to set it aside cannot possibly succeed and must be dismissed with costs.

Order accordingly.

Solicitors: *Ponmugam & Co*; *Yazid Baba & Partners*.

Reported by *Teo Keang Sood*

Captain Mustapha bin Abdullah v Brigadier-General Abdul Manap bin Ibrahim & Ors

HIGH COURT (SIBU) – ORIGINATING MOTION NO 2 OF 1986
CHONG SIEW FAI J
4 MARCH 1988

Armed Forces – Absence from settlement training – Court martial – Application for order of prohibition to prohibit court martial from being convened – Merits of case

Administrative Law – Court martial – Order of prohibition prohibiting court martial from being convened – Application for – Merits of case

The applicant was a captain serving in the armed forces and had left for West Malaysia without the necessary approval of the appropriate authority. A court martial was convened to try the applicant. By an originating motion, the applicant applied for an order of prohibition prohibiting a court martial from hearing and trying eleven charges against him. The grounds relied on by the applicant were: (a) that the court martial has no jurisdiction to hear the charges against him since he is no longer subject to armed service law as he was only charged after the prescribed period provided under s 144(3) of the Armed Forces Act 1972 had expired or lapsed; (b) the court martial has no jurisdiction to hear the charges against him since his commanding officer has not investigated the charges; (c) provisions of art 5 of the Federal Constitution and ss 93 and 174(4) of the Armed Forces Act 1972 were not complied with in respect of his arrest. The applicant's further contention as to ground (b) was that only the commanding officer himself could investigate the charge and that he could not delegate such power to another person.

Held: (1) From the evidence produced, the applicant was not discharged from the armed forces and as such, he is still subject to armed service law. Ground (a) of the motion thus fails.

(2) Under reg 8(1) of the Armed Forces (Summary Jurisdiction) Regulations 1976, the commanding officer had the authority to delegate the power to investigate charges. However, he could only delegate the power to investigate the four charges but not the other seven charges.

(3) It is settled law that even if the arrest was illegal or not in accordance with law, this in itself would not affect the jurisdiction of the court to try the applicant. Ground (c) is thus devoid of merit.

(4) An order of prohibition shall be issued as regards the first, third, fifth, seventh, ninth, tenth and eleventh charges. In relation to the second, fourth, sixth and eighth charges, the relief sought is refused.

Cases referred to

1 *Saw Kim Hai & Anor* v *R* [1956] MLJ 21 (folld)
2 *Saminathan* v *PP* [1937] MLJ 39 (folld)
3 *Dr A Dutt* v *Assunta Hospital* [1981] 1 MLJ 304 (FC) (refd)
4 *R* v *Local Government Board* (1882) 10 QBD 309 (CA) (refd)

Legislation referred to

Armed Forces Act 1972 ss 30(1), 93(2), (5), 95, 144(3), 174(4)
Armed Forces (Court Martial) Rules of Procedure 1976 reg 36(1)
Armed Forces (Summary Jurisdiction) Regulations 1976 regs 8(1), 12
Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982 reg 20(2)

Awang Bemee bin Awang Ali Basah for the applicant.
Abdul Aziz bin Abdul Rahim (Federal Counsel) for the respondents.

Cur Adv Vult

Chong Siew Fai J: By an originating motion, the applicant applies to this court 'for an order of prohibition prohibiting the court martial from being reconvened to hear and try the charges against the applicant'.

Originally, five grounds were stated in support of the motion. At the hearing, two were abandoned and two were amended or, rather, having parts thereof forsaken. The grounds finally relied on at the hearing are as follows:

(1) The court martial has no jurisdiction to hear the charges against the applicant since he is no longer subject to armed service law as he was only charged after the prescribed period provided under s 144(3) of the Armed Forces Act 1972 had expired or lapsed.

(2) The court martial has no jurisdiction to hear the charges against the applicant since his commanding officer has not investigated the charges.

(3) Provisions of art 5 of the Federal Constitution and ss 93 and 174(4) of the Armed Forces Act 1972 were not complied with in respect of the arrest of the applicant.

A document dated 25 September 1985 was produced on behalf of both the applicant and the respondents. In the affidavit of the applicant made on 24 November 1986, it was marked as exh 'MC', and in the affidavit of Lt Col Abdul Halim made on 21 September 1987, it was marked as exh 'AH1'. Both parties had their own translation thereof in the English language with slight variations in some of the words. Because of that, by consent of both parties, the senior court interpreter of the High Court, Sibu, was called. In his evidence, the court interpreter testified that the world 'perkenan' means consent or permission and the word 'ditetapkan' means 'be ended'. I accept the evidence as correct.

In order that the background of the case may be better understood, it may be useful to relate some of the undisputed facts.

The applicant was a captain serving in the armed forces. A letter dated 25 September 1985 signed on behalf of the chief of the armed forces concerning the service of the applicant in the forces was issued (exh 'MC' annexed to the applicant's affidavit made on 6 November 1986). The certified translation (into English) of the relevant part of the letter reads as follows:

Premature Retirement
Capt Mustapha bin Abdullah (3001304)
JLJ.

Ref: A KP(S) 53 Jil 37 (103) dated 3 August 1985

(1) I am directed to inform that, subject to the blessing of His Majesty the Yang di-Pertuan Agong, the Armed Forces Council No 243 at its meeting on 1 August 1985 had approved the premature retirement of Captain Mustapha bin Abdullah (3001304) JLJ, pursuant to r 20(2)(a) of the Permanent Army Rules (Pension, Gratuity and Other Benefits) 1982.

(2) He is to be given pension and service gratuity under r 22(2)(a) of the same Rules.

(3) He is permitted to attend resettlement course of six months as from 1 September 1985 to 28 February 1986.

(4) His service ends on 1 March 1986.

(5) Do inform officer concerned.

The correct citation of the 1982 Rules mentioned in para 1 of the letter above should be the 'Regular Forces (Pensions, Gratuities And Other Benefits) Regulations 1982'.

It is to be noted that under the letter, exh 'MC', the premature retirement of the applicant was subject to the consent of His Majesty the Yang di-Pertuan Agong and that the applicant was to undergo resettlement course or training for six months from 1 September 1985 to 28 February 1986. By letter (exh 'AH 2' annexed to Lt Col Abdul Halim's affidavit made on 21 September 1987), the address at which the applicant was to receive resettlement training as project supervisor was Diman Kontraktor Bersaudara, No 27, Tingkat 1, Kg Nyabor, Diman Hotel, Sibu, Sarawak.

By circular no 1 of 1981 (exh 'AH 3' annexed to Lt Col Abdul Halim's affidavit made on 21 September 1987) certain terms and conditions to be observed by resettlement personnel were given. Amongst these were that in the course of the resettlement training, the trainees had to obey certain laws, orders, directives, circulars and regulations specified in item 4.1 of the circular; they were not allowed to change the place and type of the approved resettlement training without written approval (item 3.10); except on compassionate grounds and with approval, they were not allowed to take leave (item 5.1); at the end of the resettlement training, they had to present themselves for a final interview with a view to ascertaining future planning (item 7.1). (See also paras 6 and 7 of Lt Col Abdul Halim's affidavit made on 21 September 1987.)

The evidence shows that the applicant absented himself from the place of resettlement training at Sibu and it is not disputed that he was arrested at Kubang Krian Kota Bahru on 5 August 1986. (See paras 6, 7 and 8 of Mukhtar bin Ismail's affidavit made on 21 September 1987.)

There is no clear evidence as to the exact date of the applicant' absence from the place of the resettlement training. However, Mejar Basry deposed that sometime in December 1985, he could not find the applicant at the approved place for resettlement training at Sibu, nor at the applicant's rented premises; and the notes left at the

applicant's rented premises requiring him (the applicant) to report to the deponent met with no response (paras 5 and 6 of Basry's affidavit made on 28 September 1987).

The affidavit evidence of Othman bin Kawi, affirmed on 24 November 1986 and adduced by the applicant himself, establishes that prior to 4 January 1986, the applicant had left for West Malaysia. On the evidence it is clear, and I so hold, that the applicant on some unknown date prior to 4 January 1986 had left for West Malaysia without the necessary approval of the appropriate authority. I also find that there is no evidence of the grant of consent for the early retirement of the applicant by His Majesty the Yang di-Pertuan Agong.

On 14 October 1986, the court martial of the applicant began. Eleven charges were brought against him. After the objection of the applicant that the court martial had no jurisdiction to try him was overruled, the trial was adjourned sine die pending determination by this court on an application to be made by the applicant. However, subsequently, a move was made to continue with the court martial. Hence this application.

Exhibit 'MB', annexed to the applicant's affidavit made on 6 November 1986, shows that of the eleven charges, five are under s 4(c) of the Prevention of Corruption Act 1961, four are under s 77(a) of the Armed Forces Act 1972, one each under s 85 and s 54(1)(a) of the said 1972 Act.

I shall now deal with ground (1) of the motion. For the applicant, it was contended that by virtue of reg 20(2) of the Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982 ('the 1982 Regulations'), the armed forces council had the power to terminate the applicant's service in the armed forces, that by the letter dated 5 September 1985 (exh 'MC' annexed to the applicant's affidavit made on 6 November 1986), the applicant had retired from the armed forces on 1 March 1986, that therefore the applicant was no longer subject to service law and could not be tried by court martial which began on 14 October 1986. Reliance was placed on s 144(3) of the Armed Forces Act 1972 and reg 20(2) of the 1982 Regulations.

The relevant part of s 144(3) of the Armed Forces Act reads:

> (3) A person shall not be triable by virtue of subsection (1) of section 143 unless his trial is begun within three months after he ceases to be subject to service law, or the trial is for a civil offence committed outside the federation and the public prosecutor consents to the trial:
>
> Provided that this subsection shall not apply to an offence against section 47 or section 48 or desertion.

It may be noted from the proviso that a charge for the offence of desertion is not affected by the above subsection.

Regulation 20(2) of the 1982 Regulations provides:

> (2) The Yang di-Pertuan Agong may require an officer to retire from the service –
>
> (a) on or after attaining the optional age of retirement appropriate to his rank as follows:

Rank	Age in Years Male	Female
(i) General/Special Duty List		
Kolonel and above	50	45
Leftenan Kolonel	47	45
Mejar	45	45
Kapten and below	45	40
(ii) Professional Duty List		
All ranks	50	45

> (b) under special circumstances if he is of the rank of Brigadier-General or above even though he has not reached the compulsory age of retirement stipulated in paragraph (1) or optional age of retirement stipulated in subparagraph (a) above;
>
> (c) on medical grounds if he is certified by a medical board to be incapable of discharging the duties of his office, by reason of an infirmity of mind or body which is likely to be permanent, whether attributable to service or otherwise;
>
> (d) for lack of suitable employment or lack of promotion prospect or supersession due to unsuitability or inefficiency not within his own control; or
>
> (e) for inefficiency or other causes within his own control but not amounting to misconduct; or
>
> (f) in the interest of the service on being charged with an offence which does not result in his conviction; or
>
> (g) for misconduct; or
>
> (h) at any time should the circumstances of the case in the opinion of the Yang di-Pertuan Agong require it.

With respect, the contentions, in my opinion, fail. Persons who are 'subject to service law' are specified in s 209(1) of the Armed Forces Act 1972. It is not disputed that up to 28 February 1986 the applicant was subject to service law, his contention being that he was no longer subject thereto as from 1 March 1986 by virtue of the letter dated 25 September 1985 (exh 'MC') referred to above. The question therefore is: Had the letter exh 'MC' (or exh 'AH' 1) the effect of ending or retiring the service of the applicant in the armed forces? If it had, as contended by the applicant, then by virtue of s 144(3) of the Armed Forces Act 1972 he would not be triable by court martial which began on 14 October 1986. It would be otherwise if it had not such effect.

In my opinion, the letter exh 'MC' (or exh 'AH 1') did not have the effect of ending or retiring the applicant's service in the armed forces. It is a letter concerning the matter of the premature retirement of the applicant expressly stated to be in pursuance of reg 20(2)(a) of the 1982 Regulations. The opening sentence of the said reg 20(2) states: 'The Yang di-Pertuan Agong may require an

officer to retire from the service ...' Furthermore, the letter exh 'MC' (or exh 'AH 1') expressly stated: '... subject to the blessing (consent) of His Majesty the Yang di-Pertuan Agong' which is clearly in line with the provisions of the said reg 20(2) quoted above.

For the applicant, emphasis was laid on the sentence: '4. Tarikh Tamat Perkhidmatan Pegawai ditetapkan pada 01 Mac 86.' In my opinion, this sentence must be read having regard to and in the context of the letter as a whole, particularly the requirement of the consent of His Majesty the Yang di-Pertuan Agong and the reference to the said reg 20(2)(a) of the 1982 Regulations therein stated. In my view, it is clear that the letter was a conditional approval, conditional upon the consent of His Majesty the Yang di-Pertuan Agong being granted. Since there is no evidence that the consent had been granted or obtained, the letter did not have the effect of putting an end to the service of the applicant.

For the applicant it was contended by reference to exh 'AH 6' dated 24 September 1986 (tendered at the trial by consent of parties) that the applicant's retirement from 1 March 1986 was valid till 24 September 1986 when it was withdrawn. I reject the contention. Although exh 'AH 6' states: 'By virtue of ref A, the army council had approved the optional retirement ... on 1 March 1986', as can be clearly seen, that statement was on the strength of 'ref A' which is exh 'MC'. I have held, for reasons given above, that exh 'MC' did not effectually terminate the service of the applicant. Exhibit 'AH 6' does not help the situation. In fact para 1 of exh 'AH 6' made reference to the termination order having been extended vide ref 'B', and para 4 thereof cancelled, amongst other things, that order of extension. Paragraph 2 of exh 'AH 6' not only spoke about postponement of the applicant's retirement date on 1 March 1986 until further notice, but also the revocation of his resettlement training with effect from the date of his absence without leave.

In short, it is my view that exh 'MC' did not end the service of the applicant on 1 March 1986 or at all. I also reject the contention for the applicant that the applicant's retirement from 1 March 1986 was withdrawn vide exh 'AH 6' on 24 September 1986. Such contention assumes the validity of the retirement from 1 March 1986, and I have held that exh 'MC' did not in effect retire the applicant from the armed forces.

There is a further ground debarring the applicant from claiming entitlement to be discharged from the armed forces by virtue of the letter exh 'MC' or exh 'AH 1'. It is not disputed that during the period of resettlement training from 1 September 1985 to 28 February 1986 the applicant was subject to service law. On the evidence in the affidavits of Lt Col Abdul Halim, affirmed on 21 September 1987, of Mejar Basry bin Adam, affirmed on 28 September 1987, and of Othman bin Kawi, affirmed on 24 November 1986, relating to the absence of the applicant from the appointed place of resettlement training and his subsequent arrest at Kubang Krian Kota Bahru on 5 August 1986, all of which I have mentioned earlier, the applicant clearly had at some unknown time before 4 January 1986 left the appointed place of resettlement training without any or any proper approval whilst subject to service law. By such conduct, the applicant would at least be reasonably suspected of having committed desertion for which he was liable to be and was in fact charged. Under s 30(1) of the Armed Forces Act, he was not entitled to be discharged. The proviso to the said s 30(1) would not apply since, on the facts, the applicant was put on trial by court martial for the alleged offence. It may also be noted that out of the eleven charges brought against the applicant, the seventh and the eighth charges (see exh 'MB' annexed to the applicant's affidavit made on 6 November 1986) were allegedly committed on 11 October 1985, ie after the date of the letter exh 'MC' or exh 'AH 1'.

I hold that ground (1) of the motion fails.

I shall now consider ground (3) of the motion. The complaint under ground (3) of the motion was that the arrest of the applicant was unlawful in that it contravened:

(1) section 93(2) of the Armed Forces Act in that the arrest was effected by a staff-sergeant, ie an officer beneath the rank of that of the applicant who was a captain;

(2) section 174(4) of the Armed Forces Act in that the applicant was not produced before a magistrate when the said s 174(4) required such production within 24 hours of the arrest.

It was further contended that there had, therefore, been a violation of art 5(1) of the Federal Constitution which provided that 'no person shall be deprived of his life or personal liberty save in accordance with law.'

For the respondents, it was submitted that the arrest was made on the order of a provost officer under s 93(5) of the Armed Forces Act and sub-s (2) thereof had no application. It was also contended that the provisions of arrest applied to the commission of all offences against any provision of the Armed Forces Act, including that of desertion, and that production of the arrestee before a magistrate was not necessary because s 93 did not specify such requirement.

For the purpose of this motion, I find it unnecessary to determine the issues because, as conceded by counsel for the applicant, it is settled law that even if the arrest was illegal or not in accordance with law (which I am not deciding), this in itself would not affect the jurisdiction of the court to try the applicant. See *Saw Kim Hai &*

Anor v *R* [1] and *Saminathan* v *PP*.[2] Accordingly, this ground is devoid of merit.

I now come to the second ground of the motion. Here the applicant disputed the jurisdiction of the court martial on the ground that the commanding officer of the applicant did not investigate the charges brought against him (the applicant). It is not in dispute that in relation to this ground of the motion, the commanding officer of the applicant at all material times was Mejar Abdul Rashid bin Sujan (see paras 2 and 3 of Mejar Abdul Rashid's affidavit made on 28 September 1987).

Section 95 of the Armed Forces Act 1972 provides:

> Before an allegation against a person subject to service law under this Act (hereinafter referred to as 'the accused') that he has committed an offence against any provision of this Part is further proceeded with, the allegation shall be reported, in the form of a charge, to the accused's commanding officer, and the commanding officer shall investigate the charge in the prescribed manner.

As indicated earlier, the complaint of the applicant was that his commanding officer had not investigated the charges against him (the applicant). This he did in:

(a) ground (2) of the ex parte originating motion herein dated 10 November 1986;

(b) ground (2) of the originating motion herein dated 2 December 1986 (as amended at the hearing); and

(c) paragraph 10 of his affidavit made on 24 November 1986.

In para 3 of his affidavit made on 24 November 1986 in support of the motion, the applicant stated that at the hearing of the motion he would refer to his affidavit made on 6 November 1986 in support of his ex parte application for leave for its full terms and effect. In para 3(b) of the applicant's affidavit made on 6 November 1986 in support of the ex parte originating motion, the applicant also contended to the effect that his commanding officer did not investigate the charges.

In the face of the above assertions, the commanding officer Mejar Abdul Rashid made no denial. Nor did he state that he had himself investigated. Furthermore, para 8 of Lt Col Abdul Halim's affidavit made on 21 September 1987 also tends to support that the commanding officer did not himself investigate.

On the evidence, I come to the conclusion that the applicant's commanding officer did not personally investigate the charges against the applicant. The argument in this court that he did so investigate is not supported by evidence, and I reject it.

However, this does not conclude the matter. In para 3(b) of his affidavit made on 6 November 1986, the applicant deposed:

> (b) I am also advised that in a case like mine, the charges should have been investigated by my commanding officer, in this case the second respondent. *Instead investigations were carried out by Captain Asman bin Mohd Yusof* ...
>
> (emphasis added)

In paragraph 10 of his affidavit made on 24 November 1986, the applicant said:

> 10. ... In law only my commanding officer Major Abdul Rashid bin Sujan (411382) could investigate the charges against me. He could only delegate his power to Captain Azman to cause evidence to be reduced in writing but not the power to investigate. Major Abdul Rashid bin Sujan not only did not investigate the charges against me but also could never and indeed never delegated such power to Captain Azman.

From the above affidavit evidence, it is clear that the applicant admitted that Captain Azman had investigated the charges against him, and that his contention, however, was that only the commanding officer himself could investigate and that he could not delegate such power to Captain Azman.

In answer to para 3(b) of the applicant's affidavit made on 24 November 1986, Lt Col Abdul Halim in paragraph 8 of his affidavit made on 21 September 1987, said:

> 8. ... I am also advised that under the same rules, the commanding officer may delegate the conduct of the investigation to another officer. I, therefore, humbly submit that in the applicant's case, Captain Azman bin Mohd Yusof (3000596) has been properly delegated to investigate the offence and took abstract of evidence against the applicant. Therefore, the investigation was lawfully done and was done in accordance with existing rules and provisions of the law.

In reply to the said para 8 immediately quoted above, the applicant in para 5 of his affidavit made on 30 December 1987, said:

> 5. From paragraph 8 of the said affidavit, it is clear that my commanding officer never investigated the charges against me, for all that he did was instruct one Captain Azman bin Mohd Yusof to take the abstract of evidence and this cannot be equated with investigation.

Now, I would make two observations respecting this para 5. First, this reply with reference to para 8 of Lt Col Abdul Halim's affidavit is not quite correct in so far as contending that all the commanding officer did was instruct Captain Azman to take the abstract of evidence, for in the said para 8 Lt Col Abdul Halim had clearly deposed about delegating investigation to Captain Azman. Secondly, and more importantly, this contention of the applicant runs counter to the clear admission in his own affidavit made on 6 November 1986 that investigations were carried out by Captain Azman. In this connection, I am also aware that in para 4 of the commanding officer Mejar Abdul Rashid's affidavit made on 28

September 1987, there was no mention of instructing Captain Azman to investigate. But this, in my opinion, is not sufficient ground for holding against the respondents because:

(1) the said para 4 was in answer to para 3(b) of the applicant's affidavit made on 6 November 1986, and

(2) in the said para 3(b), the applicant had admitted that investigations had been carried out by Captain Azman, his complaint being that the commanding officer himself should investigate.

On his own admission, the applicant cannot be heard to say that Captain Azman bin Mohd Yusof had not investigated the charges against him. The evidence points to the conclusion that the captain had so investigated.

For the applicant, it was contended that the commanding officer did not delegate the power of investigation to Captain Azman. It will be noted that this is not a ground stated in the statement filed pursuant to O 53 r 1(2). The seeming statement of the applicant that the power to investigate was not so delegated, appearing in para 10 of the applicant's affidavit made on 24 November 1986, was a change of ground or an additional ground for which no leave of court was sought or obtained (O 53 r 3(1) and (2)). With respect, rules are to be observed and an applicant should not be allowed to roam at large, outside its proper confines (see the observations in *Dr A Dutt* v *Assunta Hospital* [3]).

Furthermore, in answer to the point raised by the applicant that the investigations were carried out by Captain Azman (see para 3(b) of the applicant's affidavit made on 6 November 1986), Lt Col Abdul Halim said that the captain had been properly delegated to investigate (see para 8 of his affidavit made on 21 September 1987). Against this assertion of the Lt Col, there is no rebuttal directly in point. Paragraph 5 of the applicant's affidavit made on 30 December 1987 dealt with the captain making abstracts of evidence and, therefore, does not answer the point. In short, the alleged non-delegation of power to Captain Azman to investigate the charges is not one of the grounds stated in the statement filed under O 53 r 1(2). But even if this ground may be advanced, it has been refuted in the affidavit of the Lt Col against which there was no rebuttal. The contention, therefore, must fail.

The central issue is: Could the commanding officer, in law, delegate the task of investigation? Or must he personally investigate? As no argument was advanced by either side on this important question at the initial hearing, I invited counsel on both sides to address me thereon. After hearing their submissions and after considering the matter, I am of the view that delegation is permissible. Under reg 8(1) of the Armed Forces (Summary Jurisdiction) Regulations 1976, the commanding officer had the authority to delegate the power to investigate charges.

A further question, however, is: Could the commanding officer, in law, delegate the power of investigation respecting all the eleven charges? The answer lies in reg 8(1) read with reg 12 of the Armed Forces (Summary Jurisdiction) Regulations 1976. The said reg 8(1) provides for delegation of powers by commanding officers. So far as is relevant, it reads:

> 8. (1) ... an officer who is a commanding officer within the meaning of regulation 4, 5 or 6 may delegate to a subordinate commander, whatever his rank may be, who is under his command and directly responsible to him in disciplinary matters, the power to investigate and deal summarily with charges with which he himself may so deal under regulation 12:
>
> Provided that such delegation shall not include (a) ... and (b) the power to order the taking of a summary of evidence or the making of an abstract of evidence.

The said reg 12 provides:

> 12. A commanding officer or an appropriate superior authority may deal summarily with a charge under any of the following sections of the Act: 44, 46(e), 49, 50(2), 51, 52, 55, 56, 57, 58, 59(1)(a), 60, 61(c) and (d), 62(c), 63, 64, 65(2), 66, 67, 72, 77(a) and (b), 81(b), 86 (where the principal offence can be dealt with summarily by virtue of this Regulation), 87 and 88 (where the civil offence is one which is specified in the Second Schedule to these Regulations).

It is clear that in respect of the eleven charges against the applicant, the commanding officer could in law delegate to Captain Azman the power to investigate the four charges under s 77(a) of the Armed Forces Act 1972 (ie the second, fourth, sixth and eighth charges in exh 'MB' annexed to the applicant's affidavit made on 6 November 1986), but not the other seven charges.

My attention was drawn to the proviso to reg 8(1) of the said 1976 Regulations to the effect that the delegation could not include the power to order the making of abstracts of evidence. In this respect, counsel for the respondents pointed out that the matter excluded for delegation was 'the power to order' as opposed to the power of making abstracts of evidence which, under reg 36(1) of the Armed Forces (Court Martial) Rules of Procedure 1976, may be made by another officer directed by the commanding officer. The view seems to me to be correct.

On the evidence and materials before me, I hold that prohibition does not lie in relation to the four charges under s 77(a) of the said Act. The motion, to that extent, therefore fails.

As regards the remaining seven charges, they could not be dealt with summarily by the commanding officer himself under reg 12 of the Armed Forces (Summary Jurisdiction) Regulations 1976 and, therefore, could not

in law be validly delegated for purpose of investigation. Investigation of those seven charges by the captain is, therefore, bad.

The next question is: Since there had been no investigation by the commanding officer and no valid investigation by Captain Azman respecting the seven charges, should prohibition lie respecting thereof?

In response to my question on this point, at the initial hearing, though somewhat differently phrased, Encik Abdul Aziz, counsel for the respondents, whilst recognizing the tendency of the courts demonstrating a marked reluctance from seeming to interfere with the proceedings of military authorities, nevertheless, candidly conceded that prohibition ought to lie after making references to ss 95, 96, 97, 98 and 103 of the Armed Forces Act 1972, and rr 52 and 61(1) of the Armed Forces (Court Martial) Rules of Procedure 1976, and the consequences thereof that could have ensued in favour of the applicant such as dismissal of charges, having the charges dealt summarily, the necessity of speedy investigation and want of jurisdiction on the part of the court-martial owing to non-investigation. With that view of counsel, I am inclined to agree.

Also, where part only of a party's request for a prohibition proves to be well founded, and the matter is divisible, the court may grant prohibition in respect of that part: *R* v *Local Government Board*[4] (at p 320).

Having considered all the evidence and all the circumstances of the case as well as submissions by counsel, and, for the reasons given above, I come to the conclusion that prohibition lies and shall be issued respecting the first, third, fifth, seventh, nine, tenth and eleventh charges contained in the charge sheet exh 'MB' annexed to the applicant's affidavit made on 6 November 1986. In relation to the second, fourth, sixth and eighth charges contained in exh 'MB', the relief sought is refused. As to the costs, since both parties partially succeeded in the motion, I order that each party pays its own costs.

Order accordingly.

Solicitors: *Battenberg & Talma.*

Reported by *Ng Sheau Jiuan*

Syarikat Jengka Sdn Bhd v Tri-Trade Properties (M) Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C3449 OF 1984
ZAKARIA YATIM J
18 JANUARY 1988

Civil Procedure – Striking out statements of defence – Application for – Whether triable issues raised – Letter written by second defendant on instruction of first defendant – Whether letter constituted a letter of undertaking or guarantee

Legal Profession – Letter written by solicitors on instruction of client – Whether letter amounted to a letter of solicitor's undertaking – Triable issue

The plaintiff claimed against the first and second defendants for a certain sum of money in respect of goods sold and delivered by the plaintiff to the first defendant. The plaintiff averred that by a letter of undertaking, the second defendant (the first defendant's solicitors) undertook to pay the plaintiff all outstanding sums in the first defendant's account with the plaintiff up to a certain limit. The second defendant, in its defence, contended that it had signed its name in the said letter of undertaking on behalf of its clients, the first defendant, and that the letter was not a letter of guarantee, indemnity or undertaking.

The senior assistant registrar dismissed the plaintiff's application to strike out the statements of defence of the second defendant on the grounds that there were triable issues of fact. The plaintiff appealed against the decision of the senior assistant registrar.

Held, dismissing the appeal: The letter in question was clearly written by the second defendant as an agent of the first defendant. The undertaking was not given by the solicitor or solicitors personally. Clearly, there are issues to be tried in this case.

Cases referred to

1 *T Damodaran* v *Choe Kuan Him* [1975] 2 MLJ 274 (distd)
2 *United Mining and Finance Corporation, Ltd* v *Becher* [1910] 2 KB 296 (refd)
3 *Seah Choon Chye* v *Saraswathy Devi* [1971] 1 MLJ 112 (refd)

Tan Chuan Yong for the plaintiff.
VK Palasuntharam for Thomas Lee (one of the parties in the second defendant's firm).

Cur Adv Vult

Zakaria Yatim J: This is an appeal against the decision of the senior assistant registrar Mr Wong Teik Meng, given on 15 August 1985, ordering that the application of the plaintiff dated 24 April 1985 for an order that both the statements of defence of the partners of the second defendant (sued as a firm) be struck off and judgment entered against the second defendant be disallowed on the grounds that there are triable issues of fact in this matter.

The plaintiff is a private limited company incorporated in Malaysia with its registered office at no 13A,